No. 13559

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ALASKA STEAMSHIP COMPANY AND AMERICAN RADIO ASSOCIATION, C. I. O., RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court on petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended,[1] for enforcement of its order issued against Alaska Steamship Company, herein called the Company, and America Radio Association, C. I. O., herein called the Union, on February 11, 1952, following the usual proceedings under Section 10 of the Act. This Court has jurisdiction of these proceedings under Section 10 (e) of the Act, the unfair labor practices

[1] 61 Stat. 136, 29 U. S. C., Supp. V, Sec. 151 *et seq.* Relevant portions of the Act appear in the Appendix, *infra*, pp. 21–25.

having occurred within this judicial circuit at Seattle, Washington.[2] The Board's decision and order are reported at 98 N. L. R. B. 22 (R. 24–86, 97–105).[3]

STATEMENT OF THE CASE

I. The Board's findings of fact and conclusions of law

The Board found that the Company violated Section 8 (a) (3) and (1) of the Act by denying employment to Horace Underwood because he resigned from membership in the Union, and that the Union violated section 8 (b) (1) (A) and (2) of the Act by causing the Company to do so. The discrimination occurred pursuant to a hiring arrangement which granted preference in hiring to members of the Union and which in practice denied job referrals to nonmembers by barring their names from the Union's assignment list. At the time in question the Company and the Union had no lawful union-security agreement as permitted by Section 8 (a) (3) of the Act.

The subsidiary facts, as found by the Board and as shown by the evidence, may be summarized as follows:

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[2] The Company, a Washington corporation with its principal office and place of business in Seattle, Washington, is engaged in the operation of ships for the transportation of persons and cargo between ports in the United States and ports in the Territory of Alaska. The Company concedes that it is engaged in commerce within the meaning of the Act; accordingly, no jurisdictional question is presented (R. 28; 9, 10, 18, 124, 125).

[3] The symbol "R." refers to the printed record. References preceding a semicolon are to the Board's findings. Those following are to the supporting evidence.

A. The hiring-hall arrangement between the Company and the Union

1. *The 1948 contract granting preference in hiring to Union members*

The Company is a member of the Pacific Maritime Association, known as PMA, and was a member of PMA's predecessor, Pacific American Ship Owners' Association, herein called PASA (R. 29; 19).

In December 1948, PASA and the Union executed a collective bargaining agreement (Gen. Counsel Exh. 3)[4] under which members of PASA, including the Company, agreed *inter alia* that the "offices of the [Union] shall be the central clearing bureaus through which all arrangements in connection with the employment of Radio Officers shall be made," and that "when filling vacancies preference of employment shall be given to members of the [Union]" (R. 29–31; 19, Gen. Counsel Exh. 3, p. 2).[5]

2. *The Union's practice of restricting job referrals to members only*

Early in 1949, the Union adopted certain shipping rules, which supplied detailed regulations and procedure for carrying out the broad preferential hiring

[4] By stipulation the parties agreed to dispense with the printing of exhibits, since in most instances the essential content of the more important exhibits is set forth in the Intermediate Report of the Trial Examiner (R. 291–292).

[5] The 1948 agreement remained in effect until July 1950, when it was replaced by a new agreement between PMA, PASA's successor, and the Union which, while retaining the hiring-hall provision, omitted the preferential hiring clause and provided that the Union would not discriminate against nonmembers in job referrals (R. 29; 19, Gen. Counsel Exh. 4, p. 4). The 1950 agreement is not involved herein, the unfair labor practices having occurred under the 1948 agreement. The Board dismissed the allegations of the complaint respecting the 1950 agreement (R. 41–47).

provisions of the 1948 agreement with respect to the assignment of radio officers to job vacancies (R. 31; Gen. Counsel Exh. 2). Under these rules the Union maintained a national assignment list which was compiled each week (R. 32; Gen. Counsel Exh. 2). The assignment list was open to members of the Union only (R. 32; 227–229, 243, 251–253).[6] To obtain a place on the list a member was required to file an application with the Union stating the port from which he wished to ship (R. 32; Gen. Counsel Exh. 2). If the application was accepted, the member would then be placed on the list and designated as "Active," namely, available for employment for the port specified (R. 32; 191–192, Gen. Counsel Exh. 2).

Job vacancies were filled from the list in accordance with the principles of rotary hiring, as follows: When a member company of PASA needed a radio officer, it would notify the local office of the Union that a job was available at a specified port (R. 32, 33; 187–189, 246, 255–258). The local office would then offer the job to the active member who had signed for that port and whose number was lowest in numerical order on the list (R. 33; Gen. Counsel Exh. 2). If the member accepted the job, he would be issued clearance by the Union (*ibid.*). Otherwise, the offer was repeated until the local office secured a member of the Union who would accept the job (*ibid.*). A vacancy could be filled from outside the

[6] The shipping rules were changed in June 1950, so as to allow nonmembers to obtain places on the assignment list (R. 37, 38; 182, 183, 227, 228). This was after the occurrence of the unfair labor practice here involved.

list only in the event that nobody on the list would accept the job (*ibid.*). There is no indication in the record, however, that such a contingency ever arose.

When a member of the Union obtained employment, his designation on the list would be changed from "Active" to "Employed" (*ibid.*). Thereafter, for each week of employment an employed member's number on the list was increased by 30, thereby causing him to move toward the bottom of the list (*ibid.*). Meanwhile, the unemployed or "Active" members were progressing toward the top of the list, taking the places formerly held by members who had secured employment (*ibid.*). When an employed member became unemployed, which ordinarily occurred when the ship to which he had been assigned was withdrawn from service for repairs or other reasons, he was required to register again with the Union for a place on the list (R. 48, 49; 142, 143, 246, 247). A registration continued in force until the unemployed member obtained employment (R. 174, 175, 247).

B. The denial of employment to Horace Underwood because of his resignation from the Union

1. Underwood joins the Union and is placed on the assignment list

On March 1, 1949, Horace Underwood, a qualified radio officer, joined the Union, and shortly thereafter was placed on the Union's assignment list as an "Active" member for the Port of Seattle, Washington, from which the Company operated its ships (R. 47; 109–113). On March 31, 1949, Underwood accepted referral to the *Coastal Rambler,* one of the Company's ships (R. 48; 112, 140–141, Union Exh. 5). He re-

mained so employed until early August 1949, when the *Coastal Rambler* was removed from service (*ibid.*). On August 10, 1949, Underwood registered for the list, and on September 14, was assigned to the *Palisana,* another of the Company's ships (R. 49–50; 113, Union Exh. 5). About November 23, 1949, the *Palisana* was withdrawn from service, and on December 1, 1949, Underwood again registered and was placed on the list (R. 50; 131, Union Exhs. 5 and 28, p. 13).

2. Underwood resigns from the Union and is taken off the assignment list

Underwood was opposed to the Union's system of rotary hiring because, as it worked out, the system prevented a radio officer from obtaining permanent employment with any one employer and Underwood was interested in employment with the Company only (R. 51, 52; 111–115, 148–153, Union Exh. 6). Underwood felt that he was entitled to seniority rights with the Company and that the rotary hiring system, depriving him of such rights, resulted in discrimination against him (R. 51, 52; 148–153, Union Exh. 6). Therefore, on December 20, 1949, Underwood resigned from the Union (R. 52, 53; 115–118, Union Exh. 6). Shortly thereafter the Union accordingly removed Underwood's name from the assignment list (R. 53; 179–182, 247, 248, 251–253).

After resigning from the Union, Underwood made repeated attempts to obtain employment directly with the Company (R. 54–57; 126–131, Gen. Counsel Exh. 8). The latter refused, however, to accept Under-

wood's application for employment on the ground that it hired through the Union only (R. 55; 126–131, 138, Gen. Counsel Exh. 9). On March 29, 1950, the Company wrote to the Union, asking it not to discriminate against Underwood and one Dallas Hughes in filling the Company's requests for radio officers (R. 55; Gen. Counsel Exh. 10). A week later the Company wrote the Union stating that Underwood had expressed the opinion to the Company that the Union would discriminate against him, and voicing the hope that the Union would not. On April 19, 1950, the Union replied that Underwood had been listed for employment and that there would be no discrimination against him (R. 55–57; 178). The Union did not in fact, however, restore Underwood's name to the assignment list so as to make him eligible for referral (R. 53, n. 11, 57; 115–119, 131–138).

3. *Underwood is denied referral to the Company's ship, the "Alaska"*

On the assignment list for January 7, 1950, the last upon which his name appeared, Underwood had a lower number than Lewis Deyo, a member of the Union, and was therefore entitled to referral ahead of him (R. 65, 66, n. 23 Union Exh. 28). Under the Union's shipping rules (*supra,* pp. 3–5), Underwood, had he remained on the list, would have continued to be numerically lower than Deyo until Underwood obtained employment (R. 65, 66; Gen. Counsel Exh. 2). In other words, as long as Underwood remained unemployed, Deyo could not have advanced beyond him on the list (*ibid.*).

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As of May 5, 1950, Underwood had not obtained employment with the Company (R. 56; 115, 138).[7] On that date a vacancy occurred in the position of second assistant radio operator aboard the *Alaska,* one of the Company's ships (R. 57, 58, 65; Union Exh. 27). This was a position which Underwood would have accepted if it had been offered to him (R. 67, 68; 147–149, 172, 173). Moreover, had his name not been removed from the assignment list, Underwood would have been entitled to the position ahead of Deyo because, as previously explained, he would have been numerically lower than Deyo on the assignment list. However, the position was filled by the Union's referral of Deyo (R. 65; Union Exh. 27).

II. The Board's conclusions of law

Upon the foregoing facts, the Board found that the provisions of the 1948 agreement, granting preference in hiring to members of the Union, were illegal since they went beyond the limited union-security conditions permitted by Section 8 (a) (3) of the Act (R. 63–73).[8] The Board found also that, pursuant to the preferential hiring provisions of the agreement,

[7] From the time of Underwood's resignation from the Union, until May 5, 1950, there were six vacancies on ships of the Company for which he was qualified. These vacancies were filled by referral of Union member radio officers who were numerically lower than Underwood on the assignment list for January 7 (R. 65; Union Exh. 27). These officers, of course, had remained on the list after Underwood's name had been removed.

[8] The Board referred to its earlier decision in *Pacific Maritime Association*, 89 N. L. R. B. 894, holding that the execution of the 1948 agreement had been violative of Section 8 (a) (1) because of the illegal preferential hiring provisions (R. 29, 34).

Underwood was denied employment with the Company because he had resigned from membership in the Union (R. 67). Accordingly, the Board concluded that the Company discriminated against Underwood in violation of Section 8 (a) (3) and (1) of the Act, and that by causing the Company to do so, through the illegal hiring agreement, the Union violated Section 8 (b) (2) and (1) (A) (R. 68). The Board concluded further that the removal of Underwood's name from the assignment list, in itself, constituted discrimination against Underwood, in violation of Section 8 (a) (1) and (3) by the Company, and Section 8 (b) (2) and (1) (A) by the Union (R. 99).

III. The Board's order

The Board's order (R. 100–105) requires the Company to cease and desist from encouraging membership in the Union by refusing to employ applicants because they are not members of the Union; or by otherwise discriminating against its employees for this reason, except to the extent authorized by Section 8 (a) (3) of the Act; and from in any like or related manner interfering with its employees in the exercise of their rights under the Act. Affirmatively, the Company is ordered to offer Underwood employment as a radio officer aboard the *Alaska,* or a substantially equivalent position, and to post appropriate notices.

In addition, the Board's order requires the Union to cease and desist from causing the Company to refuse to employ applicants because they are not members of the Union; from causing the Company to discriminate against its employees for this reason,

except to the extent authorized by Section 8 (a) (3) of the Act; and from in any like or related manner interfering with the Company's employees in the exercise of their rights under the Act. Affirmatively, the Union is ordered to restore Underwood's name to the assignment list and to refer him to assignments in accord with his proper place on the list.[9]

Finally, the Board's order requires both the Company and the Union jointly and severally, to make Underwood whole for any loss of wages he may have suffered by reason of the discrimination against him.

ARGUMENT

Substantial evidence on the whole record supports the Board's finding that the Company discriminated against Underwood because of his nonmembership in the Union, in violation of Section 8 (a) (3) and (1) of the Act, and that the Union caused the Company to do so, in violation of Section 8 (b) (2) and (1) (A)

A. The denial of employment to Underwood pursuant to the preferential hiring agreement between the Company and the Union, was unlawfully discriminatory

We believe that the whole record here affords ample support for the Board's findings against both the Company and the Union.

At the outset, the preferential hiring provisions of the 1948 agreement between PASA and the Union, to which the Company was a party, were unlawful on their face, as the Board found (R. 39–40). Providing that "when filling vacancies preference of employment

[9] The Board found (R. 41–47, 105) that the hiring arrangement between the Company and the Union pursuant to the new and revised contract of 1950, was not unlawful, since there was no preferential treatment of Union members or discrimination against nonmembers under the new contract (*supra*, p. 3, n. 5).

shall be given to members of the [Union]" (R. 30), the contract terms obviously fail to come within the exception to the statute's proscription of discrimination in regard to hire or tenure of employment because of union affiliation (Section 8 (a) (3) of the Act). The exception afforded by the proviso to Section 8 (a) (3) permits only a limited union-security agreement which may require membership in the contracting union 30 days after employment begins or 30 days after the effective date of the contract, whichever is later. The terms of the 1948 agreement, providing for preferential treatment of Union members at the initial hiring, were therefore unlawfully discriminatory.[10] Cf. *Katz* v. *N. L. R. B.*, 196 F. 2d 411, 413–415 (C. A. 9); *N. L. R. B.* v. *Local 743, United Brotherhood of Carpenters and Joiners of America, AFL,* 202 F. 2d 516, 518 (C. A. 9); *N. L. R. B.* v. *United Hoisting Co., Inc.,* 198 F. 2d 465, 466 (C. A. 3), certiorari denied, 344 U. S. 914; *N. L. R. B.* v. *National Maritime Union,* 175 F. 2d 686, 688–689 (C. A. 2), certiorari denied, 338 U. S. 954; *Red Star Express* v. *N. L. R. B.*, 196 F. 2d 78, 81 (C. A. 2).

[10] In the *Pacific Maritime* case, *supra*, the Board found it unnecessary to go beyond a determination that the substantive terms of the preferential hiring provision of the 1948 agreement were illegal (89 N. L. R. B. at 895). The Trial Examiner held, however, that the hiring agreement was unlawful for the further reason that no election authorizing a union-security agreement of any kind, as then required under Sections 8 (a) (3) (ii) and 9 (e) of the Act, had been held among employees of the company-members of PMA (*id.*, at 903–904). Cf. the *Katz* case, *supra*, 196 F. 2d at 415. The election requirement has since been removed by the amendments of 1951 (Pub. Law 189, 82nd Cong., 1st Sess., October 22, 1951).

Accordingly, when the Company and the Union proceeded to discriminate against Underwood pursuant to the hiring provisions of the 1948 agreement, they were not protected under the exceptions of Section 8 (a) (3) of the Act, but were accountable for their wrongful conduct. On the facts found by the Board, there is no question but that the Company discriminated against Underwood in violation of Section 8 (a) (3) and (1) and that the Union, by causing the Company to do so, violated Section 8 (b) (2) and (1) (A). *Katz* v. *N. L. R. B.,* 196 F. 2d 411 (C. A. 9); the *Local 743* case, *supra,* 202 F. 2d at 518; *N. L. R. B.* v. *National Maritime Union,* 175 F. 2d 686, 689–690 (C. A. 2), certiorari denied, 338 U. S. 954; *N. L. R. B.* v. *Acme Mattress Co.,* 192 F. 2d 524, 527–528 (C. A. 7); *N. L. R. B.* v. *United Hoisting Co., Inc.,* 198 F. 2d 465, 466 (C. A. 3); cf. *Union Starch and Refining Co.* v. *N. L. R. B.,* 186 F. 2d 1008, 1013–1014, certiorari denied, 342 U. S. 815.

The facts with respect to the discrimination against Underwood need little elaboration. While Underwood belonged to the Union he was on the Union's assignment list and regularly obtained jobs with the Company through referral by the Union (*supra,* pp. 5–6). When he resigned from membership in the Union, however, his name was removed from the assignment list [11] and he was unable to obtain a job with the Company because of the operation of the preferential hiring agreement.

[11] Underwood sent his letter of resignation to the Union on December 28, 1949 (R. 52; Union Exh. 6). His resignation was accepted at a Union meeting some time in January 1950, and after his appearance on the assignment list for January 7, his name was removed and did not appear on any subsequent list (*supra*, p. 6).

Thus, in response to his direct application for employment in March 1950, the Company wrote Underwood on March 29 that it could not hire him because it did its hiring exclusively through the Union (R. 54–55; Gen. Counsel Exh. 9). And although the Company relayed to the Union Underwood's expressed fear that the Union would discriminate against him with respect to job referral, and requested the Union not to do so (*supra,* pp. 6–7), the fact remains that that is exactly what the Union did do. For despite the Union's assurance to the Company that it would restore Underwood's name to the assignment list and would not discriminate against him (*supra,* p. 7), the Union on May 5, acting directly to the contrary, referred Deyo to the Company for the job on the *Alaska,* to which Underwood was entitled (*supra,* pp. 7–8).

It is clear that Underwood would have been given the job but for the illegal preferential hiring agreement. The Company, which had employed him in the past, demonstrated its desire to do so again when it told him in its March 29 letter that it could not accept his direct application because of its hiring arrangement with the Union, but that he should register again with the Union, and that "we have requested that you be dispatched to us without discrimination" (R. 55–56; Gen. Counsel Exh. 9).

It is equally clear that Underwood would have obtained the *Alaska* job on May 5 if the hiring agreement, contrary to its express terms, had been administered on a nondiscriminatory basis; that is, if Underwood's name had been kept on the list despite his resignation from membership in the Union. As we

have seen (*supra,* pp. 7–8), on the assignment list for January 7, the last on which his name appeared, Underwood had a lower number than Deyo and was thus entitled to referral ahead of him. And the rotation system under which the assignment list operated made it impossible for Deyo to pass Underwood on the list as long as Underwood remained unemployed (*supra,* pp. 3–5). Therefore, if the Union had retained his name on the list from January 7 until May 5, during all of which period Underwood was not employed, he would have remained ahead of Deyo on May 5 and would have been referred to the *Alaska* job ahead of Deyo.[12]

Manifestly the Union's contention, that Underwood's resignation from membership was not the real reason for the removal of his name from the assignment list, is without merit, as the Board found (R. 53–54, n. 14). The Union's position is that it understood that Underwood desired his name removed from the list because he preferred to seek employment through other channels. But on the facts of the case this is, at best, a disingenuous claim.

In the first place, the whole point of the hiring agreement between the Company and the Union was to give preference in hiring to Union members. And the Union's shipping rules provided for the listing

[12] The Board properly rejected the claim that Deyo was ahead of Underwood on the January 7 list, which was not introduced in evidence (R. 66–67, n. 23). The list for the preceding week, December 31, 1949, which is in evidence, shows Underwood as number 828 and Deyo as number 845 (R. 66–67, n. 23, 230; Union Exh. 28, pp. 1, 13). As we have already seen, since Underwood was unemployed during this time Deyo could not possibly have gone ahead of him on the list at any time between December 31 and May 5.

of members only (*supra,* p. 4). In the second place, Underwood's letter of resignation made it clear that what he really wanted was to be able to work for the Company on the basis of his own merit as a radio officer, and to be entirely free of the Union.[13] And in

[13] Underwood's letter of resignation read as follows (R. 52–53; Union Exh. 6):

Dec. 28, 1949
Vashon, Wash.

"American Radio Ass'n"
Mr. Ralph Miller, (Seattle)
Mr. Phil O'Rourke, (S. F.)
Mr. Steinberg, (N Y K)
Gentlemen:

We are again approaching that time of the year, when new years resolutions, are in order.

My resolution—To make every effort in 1950 to rescue my family and myself from slowly encircling poverty and bankruptcy brought on by my poor luck with the "ARA" employment Roulette Wheel and certain "ARA" bylaws which infringe on my Constitutional Rights as a American citizen. To fight with all my ability the unamerican efforts of all enemies of individual freedom.

To help form a new Union of my brother workers (independent if necessary) and based on a mans rights and abilities and not on a system that automatically reduces the status of the best and most concientious worker to that of the lease efficient and undependable.

To fight a system, that professes to be conducting a campaign against communism, and other isms, but will tolerate a set of bylaws that foster, the eventual complete elimination of the freedom of the individual and the utter disregard of earned and proven seniority rights.

To make a long story short

"GENTLEMEN"
I RESIGN FROM "ARA"

Isn't it kinda foolish to work hard and pay out a lot of hard earned money in dues for the privilege of bankrupting myself?

And now Gentlemen, the time has come for you to call your meetings to order and tell them what a skunk I am for my actions—but I feel quite sure, that if there is still *even* a *small*

the absence of a valid union-security agreement between the Company and the Union, this is precisely what he had a right to do under the Act. The *Katz* case, *supra,* 196 F. 2d at 414; the *United Hoisting* case, *supra,* 198 F. 2d at 467.

But neither the Union nor the Company would permit Underwood to follow the course he desired. The Union, as we have seen, foreclosed him by removing his name from the assignment list and refusing to refer him to the Company for a job. And the Company accomplished the same end by telling him that it could not deal with him directly but could hire him only through the Union. To argue, in the face of this situation, that Underwood was denied a place on the Union's assignment list and a job with the Company for a reason other than the fact that, by resigning from the Union, he asserted his legal right to be free of the Union in the matter of obtaining employment with the Company, is simply to deny the plain facts.

Nor can the Company absolve itself of responsibility by pointing to the fact that, prior to May 5, it had requested the Union to waive the illegal union-preference feature of the hiring agreement with respect to Underwood (R. 65–66). The Company's letter to the Union on March 29, asking it to dispatch Underwood for employment "without discrimination as to union or nonunion affiliation or other discrimination whatsoever, anything in our collective bargain-

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spark of the spirit of the founders of this country, in your soul—you will understand my decision.

(Signed) H. W. Underwood
Vashon, Wash.

ing agreement to the contrary notwithstanding" (R. 67–68, n. 24; Gen. Counsel Exh. 10), was not a repudiation of its illegal hiring agreement with the Union. It was nothing more than a request that the Union make an exception of Underwood, and forego the agreement insofar as his employment was concerned. And when the Union ignored its request, the Company's gesture became totally ineffective, both as an aid to Underwood and as an excuse for the Company. For the fact remains that the Union, despite the Company's request, adhered to the preferential hiring agreement and did discriminate against Underwood by referring Deyo, a Union member on the assignment list, to the *Alaska* job, to which Underwood was entitled except for the fact that he had resigned from the Union and, accordingly, had been dropped from the assignment list. It is taking no liberties with the aim of the statute to say that, as long as the illegal union-preference hiring agreement remained outstanding, the Company was responsible for any illegal discrimination which occurred pursuant to the administration of its express terms. Cf. *N. L. R. B.* v. *A. B. Swinerton et al.*, 202 F. 2d 511, 514–515 (C. A. 9); the *Local 743* case, *supra*, 202 F. 2d at 518.

Similarly, the Company's claim that it did not know of Underwood's resignation from the Union, or that Union membership or nonmembership played any part in Underwood's opposition to the Company's hiring system (R. 67, n. 24), is of no avail. As the Trial Examiner observed (*ibid.*), the amended charge which was served upon the Company on March 21,

1950, alleged that the Company refused to employ Underwood "to encourage membership in" the Union, in violation of Section 8 (a) (3) of the Act (R. 4). And the Company forthwith wrote the Union on March 29, asking it to dispatch Underwood for employment "without discrimination as to union or nonunion affiliation" (R. 67–68, n. 24). Upon these facts the Company cannot seriously contend that, prior to May 5, it was not aware of Underwood's claim that he was being discriminated against because of his nonunion status.

In any event, as already suggested, the Company was responsible for the discrimination against Underwood, without regard to the matter of its knowledge as to the details of Underwood's particular case. The Company, having entered into, and continuing to maintain, a hiring agreement the stated purpose of which was to give illegal preference to Union members, and conversely to discriminate illegally against nonmembers, is in no position to assert that in a particular case it did not *know* that the discriminatory purpose of its agreement was being carried out.

Under the Company's view, the maintenance of an unlawful preferential hiring agreement would stand for nothing. For, despite the discriminatory intent expressed in such an agreement, the employer would never be responsible for any acts of discrimination thereunder, unless in each instance his discriminatory intent were proved anew. The Company's position, we submit, is entirely untenable.

B. The removal of Underwood's name from the Union assignment list was also unlawfully discriminatory

The Board properly found (R. 99) that "the act of removing Underwood's name from the assignment list in itself constituted discrimination in violation of Section 8 (a) (1) and (3) of the Act by the Respondent Employer and Section 8 (b) (1) (A) and (2) of the Act by the Respondent Union."

We have already seen that the preferential hiring agreement was unlawful because it operated to discriminate in favor of Union members and against nonmembers. And in conjunction with the hiring agreement the Union maintained exclusively for Union members the assignment list from which it selected radio officers for referral for available jobs. Since it was impossible, as was demonstrated in Underwood's case, for a man to obtain a job with the Company without referral by the Union, removal of a man's name from the assignment list was the equivalent of removing him from any opportunity for a job. Therefore, where such removal was effected, as in Underwood's case, because of the radio officer's lack of membership in the Union, it constituted proscribed discrimination with respect to terms and conditions of employment, under Section 8 (a) (3) and (1) of the Act.

Although the Union, rather than the Company, actually removed Underwood's name from the list, the Company is still accountable for the loss of opportunity for employment which the removal of his name automatically entailed. The discrimination thus prac-

ticed against Underwood, like the discrimination of May 5, was the direct result of the Company's unlawful hiring arrangement with the Union. Similarly, the Union's participation in the unlawful hiring agreement, pursuant to the terms of which the Union removed Underwood's name from the assignment list, renders the Union responsible for having caused the Company to discriminate against Underwood, in violation of Section 8 (b) (2) and (1) (A) of the Act.

CONCLUSION

For the reasons stated, it is respectfuly submitted that a decree should issue enforcing the Board's order in full.

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National Labor Relations Board.

MAY 1953.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, Sec. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice),

to require as a condition of employment, membership therein on or after the thirtieth day following the beginning of such employment, or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (*ii*) *if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement.*[1]

* * * * *

Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

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SEC. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

(1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7;

* * * * *

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discrimi-

[1] The italicized portion has been eliminated by amendment since these proceedings were instituted, see pp. 24–25, *infra.*

nate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

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PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise;

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SEC. 10. (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *.

* * * * *

SEC. 10. (e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall

certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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SEC. 18.[2] * * *

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SEC. 18. (b) Subsection (a) (3) of section 8 of said act is amended by striking out so much of the first sentence as reads "; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:" and inserting in lieu thereof the following: "and has at the time the agreement was made or within the preceding

[2] Section 18 was created by Public Law 189, 82d Cong., 1st sess., enacted October 22, 1951.

12 months received from the Board a notice of compliance with section 3 (f), (g), and (h) and (ii) unless following an election held as provided in section 9 (e) within 1 year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement:''

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